ESSO AUSTRALIA RESOURCES LTD. & 2 ORS.

v.

THE HONOURABLE SIDNEY JAMES PLOWMAN (THE MINISTER FOR ENERGY & MINERALS) & 2 ORS.

HIGH COURT AUSTRALIA, CANBERRA
MASON CJ, BRENNAN, DAWSON, TOOHEY & McHUGH JJ
7 APRIL 1995

***ARBITRATION**: Agreement to submit dispute to arbitration - Whether to be conducted in private - Whether strangers to be excluded - Effect of consent of parties.*

***ARBITRATION**: Documents and information disclosed for purposes of arbitration - Not matters of public knowledge - Whether obligation of confidentiality imposed on parties - Whether only a limited obligation exists i.e. not to disclose information in documents discovered - Whether comparable to obligation in civil litigation on parties not to disclose.*

***CONTRACT**: Implied term - Implying as a matter of law - Implying to give business efficacy to contract - Agreement to refer dispute to arbitration - Whether contains an implied term that each party will not disclose information provided in and for the purposes of arbitration in circumstances when disclosure is permitted.*

***PRACTICE & PROCEDURE**: Discovery of documents - Implied undertaking of party not to disclose contents to strangers to suit - Whether to be extended to private arbitrations.*

The appellants were the vendors of natural gas in the Bass Straits fields to two public utilities ie. the Gas and Fuel Corporation of Victoria ("GFC") and the State Electricity Commission of Victoria ("SEC") pursuant to two agreements. The agreements provided that the price payable for the gas sold was to be adjusted by taking into account charges relating to royalties and taxes attributable to the production or supply of gas. The agreement also provided that in the event of an increase or decrease, the vendors shall provide the purchasers with details thereof and the method and distribution of such royalties, taxes, rates, duties or levies.

In November 1991, the appellants sought from the two public utilities an increase in the price of gas supplied to them since 1 July 1990 purportedly due to the imposition of a new "Petroleum Resource Rent Tax". The utilities refused to pay. The appellants referred the dispute to arbitration pursuant to arbitration clauses in the agreements. The appellants did not give details of the price increase before referring the dispute.

On 1 June 1992, the Minister of Energy and Minerals (the first respondent) brought an action against the appellants and the two utilities seeking a declaration that any and all information disclosed to GFC and SEC in the course of its arbitration with the appellants was not subject to the obligation of confidence. The appellants counterclaimed for a declaration that based on an implied term the arbitration is to be conducted in private and that any documents or information supplied is to be treated in confidence as between the parties and the arbitrator and umpire except for the purpose of the arbitration. GFC and SEC also sought similar declarations against the appellants as that sought by the Minister.

The Minister, GFC and SEC had requested details of calculations on which the appellants' claims for price increases were based but the appellants declined to do so unless GFC and SEC entered into agreements not to disclose the information to anyone else including the Minister, the Executive Government and the people of Victoria. The appellants claimed that

the details were commercially sensitive. The Executive Government wanted the details and claimed that GFC and SEC were under a statutory duty to pass them on.

The trial Judge held that the appellants were obliged to furnish details of the increase sought under the provision of the agreements and made an order that details be provided to GFC and SEC. He also refused an application by the appellants that the furnishing of the details be stayed until the utilities entered into a confidentiality agreement.

The trial Judge held that there was no issue between the parties as to whether the arbitration was private. He allowed the Minister's claim and concluded that agreement to arbitrate in private does not import legal or equitable obligation not to disclose or use information obtained to third parties.

An appeal by the appellants to the Appeal Division of the Supreme Court of Victoria was allowed. The Appeal Division by majority stayed the proceedings by GFC and SEC against the appellants for the provision of details, set aside the orders for the provision of details and also set aside the declaration in favour of the Minister except declarations 6C and 6F, to the effect that GFC and SEC were not restricted from disclosing information to the Minister and third persons by reason only that the information was obtained by it from the appellants in the course of or by reason of arbitration pursuant to the Sale Agreements and the information had not otherwise been published.

On appeal to the High Court of Australia, the issues were broadly as follows:

(i) whether, by reason of an implied term in the agreement to submit a dispute to arbitration or because it is inherent in its nature, an arbitration is to be conducted in private in the sense that strangers are excluded unless both parties consent to their presence;

(ii) whether arbitrations carry an obligation of confidence imposed on the parties in relation to all documents and information that are not already matters of public knowledge;

(iii) whether there is a more limited obligation not to disclose information in documents discovered in the course of arbitration comparable to the obligation in civil litigaiton not to disclose the contents of discovered documents except for the purpose of litigation;

Held:

Per Mason CJ:

[1] It is well settled that when parties submit their dispute to a private arbitral tribunal of their own choice, in the absence of some manifestation of a contrary intention, they confer upon that tribunal a discretion as to the procedure to be adopted in reaching its decision. An arbitrator in the exercise of power with respect to procedural matters, can decide who shall be present at the hearing of the arbitration. But it is a power to decide who is entitled to attend having regard to the provisions of the relevant contract.

[2] Although the characteristic of privacy is described as an implied term, it is in accord with the history of arbitration that the characteristic inheres in the subject matter of the agreement to submit disputes to arbitration.

[3] Complete confidentiality of proceeding in an arbitration cannot be achieved and a party in some instances, could legitimately and justifiably disclose the proceedings or some aspect of an arbitration.

[4] Having regard to situations where an arbitration party could legitimately disclose information procured for the purposes of arbitration, confidentiality is not an essential attribute of arbitration. Neither can such a term be implied, as a matter of law or to give business efficacy to a contract.

[5] Consistently as it applies to discovery in Court proceedings the obligation of confidentiality attaches only in relation to documents compulsorily produced pursuant to the arbitrator's discretion. The obligation is subject to the public's interest in obtaining information about affairs of public authorities. There is no wide-ranging obligation of confidentiality to all documents and information provided in arbitration.

Per Brennan J:

[1] Absolute confidentiality of documents produced and information disclosed in an arbitration is not a characteristic of arbitrations. If a party to an arbitration agreement is subject to an obligation of confidentiality, it must be contractual in origin.

[2] To give business efficacy to the limited purpose of production or disclosure, an undertaking of confidentiality must be implied. But it is not absolute confidentiality, only qualified as the other party would have reserved the right to disseminate otherwise confidential material in certain situations.

[3] In an arbitration agreement under which one party is bound to produce documents or disclose information to the other for the purpose of the arbitration in which no other provision for confidentiality is made, a term should be implied that the other party will keep the documents produced and the information disclosed confidential except (a) where disclosure is under compulsion by law (b) where there is a duty (although not legal) to the public to disclose (c) where disclosure is fairly required to protect the party's legitimate interests and (d) where disclosure is made with express or implied consent of the party producing the material.

Per Toohey J (dissenting):

[1] The very nature of arbitration agreements, the established practice for arbitration to be conducted in private and the importance attached to privacy in arbitration hearings indicate that a term requiring privacy should be implied as a matter of law in arbitration agreements.

[2] Even though not every aspect of an arbitration is confidential in every circumstance, no sharp distinction can be drawn between privacy and confidentiality in this context. The privacy of an arbitration hearing is not an end in itself, it exists only in order to maintain the confidentiality of the dispute which the parties have agreed to submit to arbitration.

[3] In conventional litigation, documents which are disclosed and produced by one party to another under the principle of discovery are subject to an implied undertaking that they will not be used for any purpose other than for the purpose of the litigation itself. Given the private nature of the arbitration hearing, there is every reason why the same obligation should also attach to documents produced for arbitration.

[4] In addition, an obligation of confidentiality can be implied as a matter of law in commercial arbitration agreements. The term is implied from the entry by the parties into a form of dispute resolution chosen because of the privacy expected.

[5] The appeal should be allowed. However the matter should be remitted to the Supreme Court of Victoria.

[Appeal dismissed. Matter remitted to the Supreme Court of Victoria to reformulate the declarations].

Cases referred to:

Bremer Vulkan v. South India Shipping [1981] AC 909
London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd. [1958] 1 WLR 271
Haddad v. Norman Mir Pty. Ltd. [1967] 2 NSWR 676
Bibby Bulk Carriers v. Cansulex Ltd. [1989] QB 155
Hassneh Insurance v. Mew, [1993] 2 Lloyd's Rep 243
Dolling-Baker v. Merrett [1990] 1 WLR 1205
Scott v. Scott [1913] AC 417
John Fairfax & Sons v. Police Tribunal [1986] 5 NSWLR 465
Industrotech Constructors Inc. v. Duke University [1984] 314 SE 2d 272
Giacobazzi Grandi Vini S.P.A v. Renfield Corp. [1987] US Dist Lexis 1783
U.S.A. v. Panhandle Eastern Corp. [1988] 118 FRD 346
Liverpool City Council v. Irwin [1977] AC 239
Hawkins v. Clayton [1988] 164 CLR 539
Tournier v. National Provincial and Union Bank of England [1924] 1 KB 46
A.G. v. Jonathan Cape Ltd. [1976] QB 752
The Commonwealth of Australia v. John Fairfax & Sons Ltd. [1980] 147 CLR 39
A.G. (U.K.) v. Heinemann Publishers Australia Pty. Ltd. [1987] 10 NSWLR 86
A.G. v. Guardian Newspapers (No. 2) [1990] 1 AC 109
British Steel Corporation v. Granada Television Ltd. [1981] AC 1096
Alterskye v. Scott [1948] 1 All ER 469 at 471; Distillers Co. v. Times Newspapers [1975] QB 613
Riddick v. Thames Board Mills [1977] QB 881
Home Office v. Harman [1983] 1 AC 280
Codelfa Construction Pty. Ltd. v. State Rail Authority of NSW [1982] 149 CLR 337
Luxor (Eastbourne), Ld. v. Cooper [1941] AC 108
The Moorcock [1889] 14 PD 64
Con-Stan Industries of Australia Pty. Ltd. v. Norwich Winterthur Insurance (Australia) Ltd. [1986] 160 CLR 226
Reigate v. Union Manufacturing Co. (Ramsbottom) [1918] 1 KB 592
In re Anglo-Russian Merchant Traders and John Batt & Co. (London) [1917] 2 KB 679
Kursell v. Timber Operators and Contractors, Ld. [1923] 2 KB 202
Parry-Jones v. Law Society [1969] 1 Ch 1
A v. B Bank [1993] QB 311
Tournier v. National Provincial and Union Bank of England [1924] 1 KB 461
Central Queensland Cement Pty. Ltd. v. Hardy [1989] 2 Qd R 509
Crest Homes Plc., v. Marks [1987] AC 829
EMI Records Ltd. v. Spillane [1986] 1 WLR 967
Holpitt v. Varimu [1991] 103 ALR 684
Springfield v. Bridgelands [1992] 110 ALR 685
Complete Technology v. Toshiba [1994] 124 ALR 493
Tillam v. Copp [1847] 5 CB 211 [136 ER 857]
Haigh v. Haigh [1861] 3 De GF & J 157 [45 ER 838]
Traynor v. Panan Constructions Pty. Limited [1988] 7 Aust Construction LR 47 (NSW Sup. Ct)
Esso Aust. v. Plowman [1994] 1 VR 1
Oxford Shipping Co. v. Nippon Yusen Kaisha ("The Eastern Saga") [1984] 3 All ER 835
Aerospatiale Holdings Australia Pty. Ltd. [1992] 28 NSWLR 321
Elspan International Ltd. v. Aerospatiale Holdings Ltd. [1992] 67 ALJR 177

Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] AC 555
Dolling-Baker v. Merrett [1990] 1 WLR 1205
Reg. v. Socialist Worker Printers and Publishers Ltd.
Ex parte Attorney-General [1975] QB Taylor v. Attorney-General [1975] 2 NZLR 675
Ex parte The Queensland Law Society Incorporated [1984] 1 Qd R 166
Attorney-General v. Leveller Magazine [1979] AC 440
Alliance Petroleum Australia N.L. v. Australian Gas Light Co. [1983] 34 SASR 215
Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd. [1975] QB 613
Home Office v. Harman [1983] 1 AC 280
Bremer Oeltransport GmbH v. Drewry [1933] 1 KB 753

Legislation referred to:

Commercial Arbitration Act 1984 (Vict.), ss. 14, 33, 38, 39, 44, 47.
Crimes Act 1900 (NSW) s. 578
Electricity Industry Act 1993 (Vic.) I
Evidence Act 1910 (Tas.), s. 103A
Evidence Act 1929 (S.A.), ss. 69, 69a
Evidence Act 1971 (ACT), s. 83(2)
Evidence Act (NT), s. 57(1)
Gas and Fuel Corporation Act 1958 (Vict.)
State Electricity Commission Act 1958 (Vict.)

Other sources referred to:

*Law of Arbitra*tion, 20th Edn., (1982) p. 260
The Law and Practice of Commercial Arbitration in England, 2nd Edn., (1989) p. 303-304, Mustill and Boyd
Commercial Arbitration Law and Practice at para. 1.383, Jacobs
Handbook of Arbitration Practice (1987) at para. 13.6.3, Bernstein
"*Confidentiality and the "Public Interest*", (1984) 58 Australian Law Journal 497
Bray on Discovery, 1st Edn., [1885] at 238
American Jurisprudence, 2nd Edn., (1962) Vol. 5 at para. 30
Domke on Commercial Arbitration (Prac. Guide) at §4.01, 4.06
Hassneh Insurance [1993] 2 Lloyd's Rep at 247
Russell on the Law of Arbitration 20th Edn., [1982] at 260
Handbook of Arbitration Practice, 2nd Edn., (1993) at 144-145, Bernstein and Wood
New South Wales Law Reform Commission, *Training and Accreditation of Meditators*, Report No. 67, [1991] at para. 5.32.
Attorney-General's Working Party on Alternative Dispute Resolution: Report [1990] at paras. 5.18 - 5.20
Attorney-General's Department (Commonwealth), *Dispute Resolution in Commercial Matters: Papers*, (Canberra), 6 June 1986 at 11-13.
New South Wales Law Reform Commission, *Training and Accreditation of Meditators*, Report No. 67, [1991] at para. 5.32.

For the appellants - Middletons Moore & Bevins
For the first respondent - R.C. Beazley
For the second respondent - C.D. Devlin
For the third respondent - Freehill Hollingdale & Page

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JUDGMENT

Mason CJ:

This appeal raises the important question whether an arbitrating party is under an obligation of confidence in relation to documents and information disclosed in, and for the purposes of, a private arbitration. The question, in the context of this case, has its genesis in two b agreements for the sale of natural gas from the Bass Strait fields to two public utilities, the Gas and Fuel Corporation of Victoria ("GFC") and the State Electricity Commission of Victoria ("SEC"). The first agreement dated 1 January 1975 was with GFC. It was amended on three occasions, the last occasion being by a deed dated 14 February 1986. The second agreement dated 30 July 1981 was with SEC. It was also amended on three occasions, the last occasion being by deed dated 3 August 1990. The other parties to the agreements, the vendors of the c natural gas, are the first and second appellants. By deed dated 1 January 1988, the second appellant assigned its rights and obligations under the second agreement to the third appellant, BHP Petroleum (Bass Strait) Pty. Ltd. The three appellants were described as "Esso/BHP" in the Courts below.

Each of the sale agreements contained a clause whereby the price payable for the gas sold was to be adjusted by taking into account changes relating to royalties and taxes attributable d to the production or supply of gas (GFC Sales Agreement, cl. 12.8; SEC Sales Agreement, cl. 19.5.

Clause 12.8 of the GFC Sales Agreement provides, amongst other things:

> Any such increases or decreases shall be effective upon the imposition thereof. In the event of any such increase or decrease sellers shall provide Buyer with details of the increase or e decrease and the method and distribution of such royalties, taxes, rates, duties or levies.

Clause 19.5 of the SEC Sales Agreement was in similar terms. It specifically required the sellers to state "the amount and date as of which such increase or decrease is effective".

In November 1991, the appellants sought from the two public utilities an increase in the price of gas applied to them since 1 July 1990, the increase being attributable, so it was claimed, f to the imposition of a new tax, the "Petroleum Resource Rent Tax", which was imposed from that date following the abolition of a royalty previously payable by the vendor on gas produced. The utilities refused to pay. Pursuant to arbitration clauses in the sales agreements, the appellants referred the disputes to arbitration. It seems that the appellants did not provide the information required by clauses 12.8 and 19.5 before referring the disputes to arbitration.

On 1 June 1992, the predecessor of the first respondent, the Minister for Energy and Minerals, g brought an action against the appellants and the two utilities seeking a declaration "that any and all information disclosed to [GFC] in the course of its arbitration with [the appellants] is not subject to any obligation of confidence". The Minister sought a similar declaration in relation to information disclosed to SEC in the course of its arbitration. By way of counterclaim, the appellants sought declarations, based on implied terms, that each arbitration:

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> is to be conducted in private and that any documents or information supplied by any of the parties to any other party thereto in or for the purpose thereof are to be treated in confidence as between each such party and the arbitrators and umpire except for the purpose of the arbitration.

Both GFC and SEC brought a cross-claim against the appellants seeking declarations in the same terms as the declarations sought by the Minister.

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At the beginning of the hearing of the action, the Minister's Counsel, by leave, sought amended declarations. The amended declarations sought in the GFC arbitration were in these terms:

A. In respect of the arbitration between (Esso/BHP) and (GFC), a declaration that there is no implied term of the 1975 Sales Agreement requiring that the arbitration be private in the sense that any person not taking part in the arbitration is excluded from the hearing unless he or she has the permission of all parties to the arbitration to be present.

B. In respect of the arbitration between (Esso/BHP) and (GFC), a declaration that there is no implied term of the 1975 Sales Agreement imposing an obligation of confidentiality upon (GFC).

C. In respect of the arbitration between (Esso/BHP) and (GFC), a declaration that there is no implied term of the 1975 Sales Agreement imposing an obligation upon (GFC) not to disclose to third parties not party to the arbitration any of the following -

   (a) pleadings, other documents, evidence and transcript;

   (b) the award and the reasons for the award.

The Minister's Counsel sought similar amended declarations in the SEC arbitration.

On the last day of the hearing, the Minister's Counsel submitted that, in the case of the GFC arbitration, the declaration should take the following form:

1. GFC is not restricted from disclosing to the Minister and third persons information provided to it by Esso/BHP pursuant to their obligation under cl. 12.8 of the 1975 Sales Agreement to provide to GFC details of the increase or decrease and the method and distribution of such royalties, taxes, rates, duties or levies.

2. There is no express or implied term of the 1975 Sales Agreement that restricts disclosure to the Minister and third persons of information obtained by GFC in the course of or by reason of arbitration pursuant to the 1975 Sales Agreement.

3. GFC is not restricted from disclosing information to the Minister and third persons by reason only that -

   (a) the information was obtained by it from Esso/BHP in the course of or by reason of arbitration pursuant to the 1975 Sales Agreement; and

   (b) the information has not otherwise been published.

Likewise, the Minister's Counsel sought similar declarations in relation to the SEC arbitration.

The claims for confidentiality arise out of the appellants' response to requests by the Minister, GFC and SEC for details of the calculations on which the appellants' claims for price increases are based. The appellants declined to give details unless GFC and SEC entered into agreements that they would not disclose the information to anyone else, including the Minister, the Executive Government and the people of Victoria. The appellants asserted that the details sought were commercially sensitive. On the other hand, the Executive Government wants the details and claims that, if GFC and SEC obtain then, GFC and SEC are under a statutory duty to pass them on.

Clause 4(2) of the "Business and Rules" component of the Sixth Schedule to the State Electricity Commission Act 1958 (Vict.) gave the Minister power to obtain information from SEC. The sub-clause, which has subsequently been repealed, provided:

> For the proper conduct of his public business the Minister shall be entitled at all times to put himself into direct communication with all officers and employees of the Commission and also to see all documents papers and minutes which he requires either for Parliament or himself and to be supplied with copies thereof, and also to avail himself of the services and assistance of any officer or employee.

The Minister was not given a similar power in relation to GFC under the Gas and Fuel Corporation Act 1958 (Vict.).

The proceedings at first instance

The primary Judge (Marks J) held that, under clauses 12.8 and 19.5 of the respective agreements, the appellants were obliged to furnish details of the increases sought under those provisions. The primary Judge made an order that the details be provided to GFC and SEC respectively and refused an application by the appellants that the furnishing of those details be stayed until the utilities entered into a confidentiality agreement.

Having dealt with those aspects of the case, the primary Judge then directed his attention to questions concerning the privacy of the arbitration and confidentiality. The first question was whether strangers could attend the arbitration hearings without the consent of the parties. The second question was whether a party was at liberty to disclose information imparted to it in the course of the arbitration. The third question was whether GFC and SEC were at liberty to disclose information provided pursuant to clauses 12.8 and 19.5.

His Honour declined to grant a declaration on the first question on the ground that there was no issue between the parties as to whether the arbitrations were to be private. His Honour decided the third question by refusing the declarations sought by the appellants and by making six declarations in terms substantially similar to those sought by the Minister on the last day of the hearing. His Honour went on to conclude "that the mere fact that parties to a dispute agree impliedly or expressly to have it arbitrated in private does not import any legal or equitable obligation not to disclose to third parties any information at all which may be said to have been obtained by virtue of or in the course of the arbitration". His Honour also concluded that there was no general legal or equitable obligation applicable to private arbitration which precluded a party to arbitration from using information obtained in the course of it except for the purposes of the arbitration. In this respect, his Honour considered that the Court is able to protect a party (even to an arbitration) against misuse of information which has been obtained by virtue of the arbitration but the existence of power to restrain such misuse did not justify the making of the grant of relief in general terms such as was sought by the appellants in the present proceedings.

In the result, apart from dismissing the summonses for the order for a stay with costs, dismissing the counterclaim and making orders for the provision of the details pursuant to clauses 12.8 and 19.5, the primary Judge made the six declarations sought by the Minister (referred to in this judgment and in the Courts below as declarations 6A to 6F), and ordered the appellants to pay the costs of the Minister and the utilities of the claim, counterclaim and cross-claims.

The Appeal Division

The Appeal Division of the Supreme Court of Victoria (Brooking, Tadgell and Smith JJ) allowed an appeal by Esso/BHP ([1994] 1 VR 1). The Appeal Division made an order staying, pending further order, the proceedings commenced by GFC and SEC respectively against the appellants for the provision of details pursuant to clauses 12.8 and 19.5 respectively of the sales agreements, set aside the orders for the provision of details pursuant to those

clauses and also set aside declarations 6A, 6B, 6D and 6E, thereby leaving on foot only declarations 6C and 6F, to which I shall shortly refer. The Appeal Division set aside the order for costs made by the primary Judge and in lieu thereof ordered that the appellants pay two-thirds of the costs, including reserved costs, of the other parties of the action, including the counterclaim, and of the proceedings between the defendants other than the application for a stay. The Appeal Division also ordered the appellants to pay two-thirds of the costs of the Minister of the appeal, and one-half of the costs of the other respondents of the appeal including, in each case, any reserved costs.

By majority (Brooking J, with whom Smith J agreed), the Appeal Division left the following declarations on foot:

> 6C. [GFC] is not restricted from disclosing information to the Minister and third persons by reason only that:
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> (a) the information was obtained by it from Esso/BHP in the course of or by reason of arbitration pursuant to the 1975 Sales Agreement; and
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> (b) the information has not otherwise been published.
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> 6F. SEC is not restricted from disclosing information to the Minister and third persons by reason only that:
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> (a) the information was obtained by it from Esso/BHP in the course of or by reason of arbitration pursuant to the 1981 Sales Agreement; and
>
> (b) the information has not otherwise been published.

Tadgell J who otherwise agreed with the reasons for judgment of Brooking J, considered that declarations 6C and 6F should be set aside. Tadgell J considered that declarations should not have been made in the absence of knowledge of the nature of the relevant information. The terms of the two declarations did not indicate what information it was that the utilities were entitled to disclose.

Nature of information to be disclosed by the producers for the purpose of the arbitrations

Although the Courts below made no findings as to the nature of the information likely to be disclosed by the producers for the purpose of the arbitrations, an affidavit by Mr Bloking, Gippsland Gas Marketing Manager of the first appellant, gives some indication of what might be involved. He says that Esso/BHP believe that a considerable amount of documents and information may need to be disclosed concerning Esso/BHP's Bass Strait operations. He says, without being exact, the following categories of information are likely to be revealed:

> Cost information relating to the production of all petroleum products. Price, volume and revenue information relating to the sale of all petroleum products.
>
> Accounting and financial information relating to (Esso/BHP's) accounts of the Bass Strait operations.
>
> Technical operating information relating to (Esso/BHP's) gas producing operations.
>
> Reserves information relating to gas supplies in Bass Strait hydrocarbon reservoirs.
>
> Marketing information relating to contract negotiations and settlements concerning (Esso/BHP) and their customers.

Mr Bloking also claims that each of these categories contains numerous sub-categories, many of which contain information of a private, confidential or commercially sensitive nature. Other categories, he says, include proprietary technical information relating to operations of the Bass Strait Project. Further, it is claimed that the compilation of this information in meaningful form, at the cost of time, money and employment of expertise, has provided the producers with "a significant competitive advantage" which would be lost if it were disclosed publicly because comparable information on competitors would not be available to the producers.

We have been informed that, in the SEC arbitration, the arbitrator has directed the parties to exchange witness statements. The GFC arbitration has not yet reached that stage.

Arguments of the parties

The appellants submit:

(1) that the Appeal Division was correct in holding that an arbitration agreement includes a term implied by law that the arbitration be conducted in private in that strangers are to be excluded from the hearing;

(2) that it is an incident of a private arbitration that a party is not entitled to disclose, otherwise than for the purposes of the arbitration, information and documents disclosed to that party by the opposing party for the purposes of the arbitration with which that party would not otherwise have been supplied, unless disclosure is authorized by statute;

(3) that a duty of confidence is imposed by equity where:

(a) the information has the necessary quality of confidence about it; and

(b) the information has been imparted in circumstances importing an obligation of confidence;

(4) that the element mentioned in 3(a) is satisfied so long as the information or documents are not "public property and public knowledge";

(5) that the disclosure of information and documents by a party to a private arbitration to another party for the purposes of the arbitration constitutes imparting information and documents in circumstances importing an obligation of confidence for the purposes of the element mentioned in 3(b);

(6) that, in conformity with (1) to (5) above, the utilities may disclose to the Minister, if authorized by statute to do so, or for the purposes of the arbitrations, private information and documents of the appellants disclosed in the arbitrations;

(7) that declarations 6C and 6F should be set aside on the ground that they are incomplete and confusing, the appellants having always acknowledged that information and documents may be disclosed to the Minister and third parties for the purposes of the arbitration even though the information was obtained by GFC and SEC from the appellants in the course, or by reason, of the arbitrations and the information had not otherwise been published.

The appellants now claim that they are entitled to declarations in relation to the GFC arbitration in the following form:

(1) that it is any implied term of the arbitration agreement, which is cl. 23 of the 1975 Sales Agreement, that GFC is not entitled to disclose, otherwise than for the purpose of the arbitration pursuant to that Agreement, information and documents disclosed to GFC by the appellants for the purposes of the arbitration with which GFC would not otherwise have been supplied unless disclosure is authorized by statute;

(2) that GFC is bound not to disclose, otherwise than for the purposes of the arbitration pursuant to the 1975 Sales Agreement, information and documents disclosed to GFC by the appellants for the purposes of the arbitration with which GFC would not otherwise have been supplied unless disclosure is authorized by statute.

Similar declarations are sought in relation to the SEC arbitration.

The respondents' submissions are:

(1) that a restriction upon disclosure does not follow from an obligation of privacy, assuming such an obligation to exist;

(2) that an implied term restricting disclosure of information is not an incident of all private arbitrations and cannot be supported on grounds of necessity, reasonableness or common sense;

(3) that no equitable obligation of confidence arises because:

(a) it is not enough to sustain such an obligation that the information is not in the public domain; it must be secret and be important that it be kept secret;

(b) the mere fact that information is provided during an arbitration does not make it confidential; and

(c) there is nothing to show that disclosure will cause detriment to the appellants.

Privacy of arbitration

The Minister contends that the true position is that it is for the arbitrator to decide whether the hearing is to be private or not. The argument is that the question whether the hearing is to be private or otherwise is a matter of procedure and thus falls within the arbitrator's power to decide matters of procedure.

It is well settled that when parties submit their dispute to a private arbitral tribunal of their own choice, in the absence of some manifestation of a contrary intention, they confer upon that tribunal a discretion as to the procedure to be adopted in reaching its decision. (*Bremer Vulkan v. South India Shipping* [1981] AC 909 at 984; *London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd.* [1958] 1 WLR 271 at 278-280; *Haddad v. Norman Mir Pty. Ltd.* [1967] 2 NSWR 676 at 683; *American Jurisprudence*, 2nd Edn., (1962) Vol. 5 at para. 30.) No doubt the conferral of that power upon the tribunal is incidental to the power which it is given to determine the dispute submitted to the tribunal. Section 14 of the Commercial Arbitration Act 1984 (Vict.) specifically empowers the arbitrator or umpire to:

> conduct proceedings under (the) agreement in such manner as the arbitrator or umpire thinks fit.

That provision replaced earlier statutory provisions, the effect of which was to enable arbitrators to give directions as to procedural matters. However, independently of statute, arbitrators had authority to exercise that power.

There is no reason to doubt that an arbitrator, in the exercise of power with respect to procedural matters, can decide who shall be present at the hearing of the arbitration. (*Domke on Commercial Arbitration*, Rev. Edn. (1990) at §24.01). But that power is not a free-standing power; it is a power to decide who is entitled to attend, having regard to the provisions of the relevant contract.

Subject to any manifestation of a contrary intention arising from the provisions or the nature of an agreement to submit a dispute to arbitration, the arbitration held pursuant to the agreement is private in the sense that it is not open to the public. One writer has asserted that total privacy of the proceedings is one of the advantages of arbitration. (*Domke on Commercial Arbitration* (Prac. Guide) at §4.01, 4.06). The arbitrator will exclude strangers from the hearing unless the parties consent to attendance by a stranger (*Oxford Shipping Co. v. Nippon Yusen Kaisha* [1984] 3 All ER 835 at 842; *Bibby Bulk Carriers v. Cansulex Ltd.* [1989] QB 155 at 166-167). Persons whose presence is necessary for the proper conduct of the arbitration are not strangers in the relevant sense. Thus, persons claiming through or attending on behalf of the parties, those assisting a party in the presentation of the case, and a shorthand writer to take notes may appear Russell on the *Law of Arbitra*tion, 20th Edn., (1982) at 260; Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd Edn., (1989) at 303-304). It does not mater much whether this characteristic of privacy is an ordinary incident of the arbitration, that is, an incident of the subject-mater upon which the parties have agreed, or whether it is an implied term of the agreement. For the most part, the authorities refer to it as an implied term. But, for my part, I prefer to describe the private character of the hearing as something that inheres in the subject-matter of the agreement to submit disputes to arbitration rather than attribute that character to an implied term. That view better accords with the history of arbitrations. In *Hassneh Insurance v. Mew*, [1993] 2 Lloyd's Rep 243 at 246-247, Colman J said:

> If the parties to an English Law contract refer their disputes to arbitration they are entitled to assume at the least that the hearing will be conducted in private. That assumption arises from a practice which has been universal in London for hundreds of years and [is], I believe, undisputed. It is a practice which represents an important advantage of arbitration over the Courts as a means of dispute resolution. The informality attaching to a hearing held in private and the candour to which it may give rise is an essential ingredient of arbitration.

Confidentiality

As the statement just quoted makes clear, the efficacy of a private arbitration as an expeditious and commercially attractive form of dispute resolution depends at least in part, upon its private nature (Jacobs, *Commercial Arbitration Law and Practice* at para. 1.383). Hence the efficacy of a private arbitration will be damaged, even defeated, if proceedings in the arbitration are made public by the disclosure of documents relating to the arbitration. As one text writer has observed (Bernstein, *Handbook of Arbitration Practice* (1987) at para. 13.6.3):

> There would be little point in excluding the public from an arbitration hearing if it were open to a party to make public, for example in the press, or on television, an account of what was said or done at the hearing. It is suggested that a party would be entitled to an

> injunction to restrain the other party from such publication. And the same principle must apply to the arbitration as a whole, including the pleadings or statements of case, expert reports or witness proofs that have been exchanged, as well as to evidence given orally at a hearing.

It was on this basis that the English Court of Appeal, in *Dolling-Baker v. Merrett* [1990] 1 WLR 1205, restrained a party to an arbitration from disclosing on discovery in a subsequent action documents relating to the arbitration. The documents consisted of documents prepared for or used in the arbitration, transcripts and notes of evidence given and the award (*ibid*. at 1213). Parker LJ (with whom Ralph Gibson and Fox LJJ agreed), after referring to "the essentially private nature of an arbitration", said (*ibid*):

> As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must ... be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the Court.

Parker LJ went on to emphasize that the obligation arose out of the "nature of arbitration itself". The fact that a document is used in an arbitration does not confer on it any confidentiality or privilege which can be availed of in subsequent proceedings but, in considering a question as to production of documents or discovery by list or affidavit, the Court must nevertheless have regard to the obligation. However, Parker LJ concluded that, if the Court is satisfied that, despite the implied obligation, discovery and inspection are necessary for the fair disposal of the action, discovery and inspection must take place, though other means of achieving a similar result should be taken into account (*ibid*. at 1214).

On the other hand, the Minister argues that, while it is one thing to say that the hearing is private in the sense that strangers are excluded, it is another thing to say that it is confidential *Scott v. Scott* [1913] AC 417 at 453 (where Lord Atkinson said of an in camera order that it means no more than that the hearing will be in private); see also *John Fairfax & Sons v. Police Tribunal* [1986] 5 NSWLR 465 at 481 (where McHugh JA drew a distinction between a power to exclude strangers from proceedings and a power to prohibit publication). The Minister points to the fact that, before *Dolling-Baker*, there was no decision suggesting that an arbitration hearing was confidential as distinct from private. Further, in Australia and the United States, there is no support in the decided cases for the existence of such an obligation of confidence. Indeed, in the United States, the decided cases are inconsistent with the proposition that confidentiality is a characteristic of arbitration proceedings *Industrotech Constructors Inc. v. Duke University* [1984] 314 SE 2d 272 at 274; *Giacobazzi Grandi Vini S.P.A v. Renfield Corp.* [1987] US Dist Lexis 1783; *U.S.A. v. Panhandle Eastern Corp.* [1988] 118 FRD 346) and, in Australia, there is a decision implicitly denying the existence of an obligation of confidentiality (*Alliance v. Australian Gas Light Co.* [1983] 34 SASR 215 at 229-232). And members of the profession with experience in the field of arbitration have expressed in this very case conflicting views on the question whether the parties come under an obligation not to disclose the proceedings. To that may be added the comment that, if such an obligation had formed part of the law, one would have expected it to have been recognized and enforced by judicial decision long before *Dolling-Baker*.

Moreover, it has to be acknowledged that, for various reasons, complete confidentiality of the proceedings in an arbitration cannot be achieved. First, it is common ground between the parties that no obligation of confidence attaches to witnesses who are therefore at liberty to disclose to third parties what they know of the proceedings. Secondly, there are various

circumstances in which an award made in an arbitration, or the proceedings in an arbitration, may come before a Court involving disclosure to the Court by a party to the arbitration and publication of the Court proceedings. Thus, by leave of the Supreme Court, an award made under an arbitration agreement may be enforced in the same manner as a judgment or order of that Court to the same effect. Commercial Arbitration Act, s. 33. An award may become subject to judicial review s. 38. The Supreme Court may determine a preliminary point of law arising in the arbitration s. 39, and may remove an arbitrator or umpire s. 44. And the Court has the same power to make interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the Court s. 47. Thirdly, there are other circumstances in which an arbitrating party must be entitled to disclose to a third party the existence and details of the proceedings and the award. An arbitrating party may be bound under a policy of insurance to disclose to the insurer matters involved in the arbitration proceedings which are material to the risk insured against. Likewise, an arbitrating party may be obliged to disclose the existence and nature of arbitration proceedings as well as the award made in the proceedings because the disclosure is necessary in order to state accurately what are the assets and liabilities of the party or to give an indication of its future prospects. Such a disclosure may be necessary in order to comply with the statutory requirements regulating the provision of financial information by corporations or with stock exchange requirements or simply because a company considers that it is desirable that its shareholders and the market should have up-to-date information concerning the company's affairs.

The illustrations just given are but some of the instances in which a party to an arbitration could legitimately and justifiably disclose the proceedings, or some aspect of the proceedings, of an arbitration. Granted the various circumstances in which disclosure can legitimately take place, two questions necessarily arise. First, is there a legal basis for holding that there is an obligation not to disclose? Secondly, if so, how is the obligation to be defined and what are the exceptions to it?

An obligation not to disclose may arise from an express contractual provision. If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement. Importantly, such a provision would bind the parties and the arbitrator, but not others. Witnesses, for example, would be under no obligation of confidentiality.

Absent such a provision, it is difficult to resist the conclusion that, historically, an agreement to arbitrate gave rise to an arbitration which was private in the sense that strangers were not entitled to attend the hearing. Privacy in that sense went some distance in bringing about confidentiality because strangers were not in a position to publish the proceedings or any part of them. That confidentiality, though it was not grounded initially in any legal right or obligation, was a consequential benefit or advantage attaching to arbitration which made it an attractive mode of dispute resolution. There is, accordingly, a case for saying that, in the course of evolution, the private arbitration has advanced to the stage where confidentiality has become one of its essential attributes so that confidentiality is a characteristic or quality that inheres in arbitration.

Despite the view taken in *Dolling-Baker* and subsequently by Colman J in *Hassneh Insurance*, I do not consider that, in Australia, having regard to the various matters to which I have referred, we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.

The appellants' argument was designed to establish that an agreement to arbitrate contains an implied term that each party will not disclose information provided in and for the purposes of the arbitration. The argument was that the implication was to be made as a matter of law in all private agreements for arbitration unless presumably the agreement provided otherwise. There is a clear distinction between implying a term in a contract as a matter of law and implying a term in order to give business efficacy to a contract. The distinction was discussed by the House of Lords in *Liverpool City Council v. Irwin* [1977] AC 239, particularly by Lord Wilberforce (*ibid*. at 254-256). The implication of a term as a matter of law is made by reference to "the inherent nature of a contract and of the relationship thereby established", to use the words of Lord Wilberforce (*ibid*. at 254). As Deane J pointed out in *Hawkins v. Clayton* [1988] 164 CLR 539 at 572, his Lordship focused on the nature of the contract and formulated the relevant test in terms of what is necessary or required in the circumstances on the footing that "such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less" (*Liverpool City of Council v. Irwin* [1977] AC at 254).

It follows that the case for an implied term must be rejected for the very reasons I have given for rejecting the view that confidentiality is an essential characteristic of a private arbitration. In the context of such an arbitration, once it is accepted that confidentiality is not such a characteristic, there can be no basis for implication as a matter of necessity. In *Hassneh Insurance*, Colman J said of the obligation of confidentiality that ([1993] 2 Lloyd's Rep at 246):

> (t)he implication of the term must be based on custom or business efficacy.

In my view, for the reasons already stated, this approach must also be rejected.

In the light of the conclusion which I have reached, I do not need to consider whether the difficulties in defining the exceptions to any implied term forbidding disclosure are such as to preclude the implication of such a term. That the difficulties are considerable was acknowledged both by the Court of Appeal in *Dolling-Baker* and by Colman J in *Hassneh Insurance*. Colman J thought that a qualification could be formulated along the lines of the exceptions to a bank's duty of confidentiality, which had been discussed by the members of the English Court of Appeal in *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461 at 473 per Bankes LJ, 481 per Scrutton LJ, 486 per Atkin LJ. In that case, the formulations of these exceptions differed to some extent. Colman J expressed the qualification applicable to arbitration agreements in these terms [1993] 2 Lloyd's Rep at 249:

> If it is reasonably necessary for the establishment or protection of an arbitrating party's legal rights *vis-a-vis* a third party, in the sense which I have described, that the award should be disclosed to that third party in order to found a defence or as the basis for a cause of action, so to disclose it would not be a breach of the duty of confidence.

For my part, if an obligation of confidence existed by virtue of the fact that the information was provided in and for the purposes of arbitration, this statement of the qualification seems unduly narrow. It does not recognize that there may be circumstances, in which third parties

and the public have a legitimate interest in knowing what has transpired in an arbitration, which would give rise to a "public interest" exception. The precise scope of this exception remains unclear.

The Courts have consistently viewed governmental secrets differently from personal and commercial secrets (*A.G. v. Jonathan Cape Ltd.* [1976] QB 752; *The Commonwealth of Australia v. John Fairfax & Sons Ltd.* [1980] 147 CLR 39; *A.G. (U.K.) v. Heinemann Publishers Australia Pty. Ltd.* [1987] 10 NSWLR 86; *A.G. v. Guardian Newspapers* (No. 2) [1990] 1 AC 109). As I stated in *The Commonwealth of Australia v. John Fairfax & Sons Ltd.* [1980] 147 CLR at 51, the judiciary must view the disclosure of governmental information "through different spectacles". This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure (*ibid.* at 52).

This approach was not adopted by the majority of the House of Lords in *British Steel Corporation v. Granada Television Ltd.* [1981] AC 1096, where the confidential documents in question revealed the internal mismanagement of a statutory authority. In passing, the majority attributed to the public interest exception a very narrow scope, stating that, although disclosure was *of* public interest, it was not *in* the public interest (*ibid.* at 1168-1169. Lord Salmon, in a strong dissent, highlighted the sharp distinction between a statutory authority and a private company: "there are no shareholders, and [the authority's] losses are borne by the public which does not have anything like the same safeguards as shareholders" (at 1185). His Lordship concluded that the public was "morally entitled" to know why the statutory authority was in such a parlous condition). I would not accept this view. The approach outlined in *John Fairfax* should be adopted when the information relates to statutory authorities or public utilities because, as Professor Finn notes (Finn, "*Confidentiality and the `Public Interest'*", (1984) 58 *Australian Law Journal* 497 at 505), in the public sector "[t]he need is for compelled openness, not for burgeoning secrecy". The present case is a striking illustration of this principle. Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities?

An implied undertaking not to disclose documents made available in an arbitration as on discovery

In relation to documents produced by one party to another in the course of discovery in proceedings in a Court, there is an implied undertaking, springing from the nature of discovery, by each party not to use any document disclosed for any purpose otherwise than in relation to the litigation in which it is disclosed (*Alterskye v. Scott* [1948] 1 All ER 469 at 471; *Distillers Co. v. Times Newspapers* [1975] QB 613 at 618-620 per Talbot J; *Riddick v. Thames Board Mills* [1977] QB 881 at 895-896 per Lord Denning MR; *Home Office v. Harman* [1983] 1 AC 280). Over a century ago, *Bray on Discovery* stated 1st Edn., [1885] at 238:

> A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit ... nor to use them or copies of them for any collateral object ... If necessary an undertaking to that effect will be made a condition of granting an order.

Because an undertaking is implied, it has not been the practice to condition the making of orders in that way. The implied undertaking is subject to the qualification that once material is adduced in evidence in Court proceedings it becomes part of the public domain, unless the Court restrains publication of it.

It would be inequitable if a party were compelled by Court process to produce private documents for the purposes of the litigation yet be exposed to publication of them for other purposes. No doubt the implied obligation must yield to inconsistent statutory provisions and to the requirements of curial process in other litigation, e.g. discovery and inspection, but that circumstance is not a reason for denying the existence of the implied obligation.

The next step is to say that a similar obligation arises in an arbitration. In England it has been held that, because the parties to an English Law arbitration submit to the possibility that the English discovery procedure will apply to their arbitration, by implication they must be mutually obliged *Hassneh Insurance* [1993] 2 Lloyd's Rep at 247 per Colman J:

> to accord to documents disclosed for the purposes of the arbitration the same confidentiality which would attach to those documents if they were litigating their disputes as distinct from arbitrating them.

I see no reason to disagree with this statement. But, consistently with the principle as it applies in Court proceedings, the obligation of confidentiality attaches only in relation to documents which are produced by a party compulsorily pursuant to a direction by the arbitrator. And the obligation is necessarily subject to the public's legitimate interest in obtaining information about the affairs of public authorities. The existence of this obligation does not provide a basis for the wide-ranging obligation of confidentiality which the appellants seek to apply to all documents and information provided in and for the purposes of an arbitration. If the judgments in *Dolling-Baker* and *Hassneh Insurance* are to be taken as expressing a contrary view, I do not accept them.

Protection of confidential information

In argument, reference was made to the principles governing the protection of confidential information generally. No doubt these principles may have some application to information in arbitration proceedings. But these principles do not support the broad claim for confidentiality made by the appellants.

Declarations 6C and 6F

In the light of the views which I have expressed, the generality of declarations 6C and 6F may create problems. I would remit the matter to the Supreme Court of Victoria to reformulate the declarations or make such orders as may be appropriate in the light of these reasons.

Conclusion

In the result I would dismiss the appeal with costs, subject to remitter of the matter of the Supreme Court of Victoria to reformulate declarations 6C and 6F or to make such orders as may be appropriate in the light of these reasons.

Brennan J:

For the reasons which the Chief Justice gives, I agree that, when one party produces documents or discloses information to an opposing party in an arbitration that is to be heard in private, the documents or information are not clothed with confidentiality merely because of the privacy of the hearing. Nor does the use of a document in such proceedings make the document confidential. I agree also that absolute confidentiality of documents produced

and information disclosed in an arbitration is not a characteristic of arbitrations in this country. Accordingly, a party who enters into an arbitration agreement is not taken merely on that account to have contracted to keep absolutely confidential all documents produced and information disclosed to that party by another party in the arbitration.

If a party to an arbitration agreement be under any obligation of confidentiality, the obligation must be contractual in origin. A term imposing an obligation of confidentiality could be expressed in an arbitration agreement but such a term would be unusual. Nor is such an obligation imposed by the *Commercial Arbitration Act* 1984 (Vic.). A term is implied only where, *inter alia*, it is necessary (*Codelfa Construction Pty. Ltd. v. State Rail Authority of NSW* [1982] 149 CLR 337 at 347, 404), to give to the contract "such business efficacy as the parties must have intended" *Luxor (Eastbourne), Ld. v. Cooper* [1941] AC 108 at 137). The intended business efficacy must be inferred "from the very nature of the transaction" (*The Moorcock* [1889] 14 PD 64 at 70). The parties may not have consciously adverted to the subject matter of the term which is said to be implied, but implication is determined according to their presumed intention (*Codelfa Construction Pty. Ltd. v. State Rail Authority of NSW* [1982] 149 CLR at 352-353). Obligations which, if proposed to the parties when they entered into their contract, would not have been accepted by both are not thereafter implied in the contract. (*Con-Stan Industries of Australia Pty. Ltd. v. Norwich Winterthur Insurance (Australia) Ltd*. [1986] 160 CLR 226 at 241; *Reigate v. Union Manufacturing Co. (Ramsbottom)* [1918] 1 KB 592 at 605; *In re Anglo-Russian Merchant Traders and John Batt & Co. (London)* [1917] 2 KB 679 at 685-686).

Some obligation of confidentiality could be implied simply from the fact that, when a party claims the production of documents or the disclosure of information under an arbitration agreement for the purposes of the arbitration, the production or disclosure is given solely for that purpose. A duty to produce a document or to disclose information to another party, whether pursuant to an express stipulation or pursuant to the arbitrator's power to order discovery or production, is a duty imposed for the purposes of the arbitration (see *Kursell v. Timber Operators and Contractors, Ltd.* [1923] 2 KB 202 at 206). Production of documents or disclosure of information is not given to a party to be used for whatever purpose the party chooses. The duty to produce documents or to disclose information to another is an invasion of a party's right to keep the documents and information confidential and the burden of that duty would be increased beyond that contracted for if there were no restriction on the other party's freedom to disseminate the documents and information (cf. *Home Office v. Harman* [1983] 1 AC 280, at 308, 312). To give business efficacy to the limited purpose of production or disclosure, an undertaking of confidentiality must be implied. But it does not follow that an undertaking of *absolute* confidentiality is to be implied. At the time when the arbitration agreement was entered into, the party who is to receive the documents or information may have been in such a situation that it would be unreasonable to predicate of that party an intention to keep absolutely confidential the documents produced or the information disclosed. To the extent that a party would not have agreed to keep documents or information confidential, the implied obligation of confidentiality must be qualified.

Where a party is in possession of a document or information and is under a duty at common law or under statute to communicate the document or information to a third party, no contractual obligation of confidentiality can prohibit the performance of that duty (*Parry-Jones v. Law Society* [1969] 1 Ch 1 at 9, cited in *A v. B Bank* [1993] QB 311 at 322-323). Moreover, a party may be under a duty, not necessarily a legal duty, to communicate documents or information to a third party who has an interest in the progress or outcome of the arbitration. To take an example, it could not be supposed, in the absence of a clear

contrary indication, that a party which is a wholly owned subsidiary of a holding company intended to keep confidential from its holding company documents or information relating to the matter in dispute in the arbitration. Nor could a party be taken to have intended that it would keep confidential documents or information which it wished to reveal for the protection of its own interests. Nor could a party be taken to have intended that it would keep confidential documents or information when the party has an obligation, albeit not a legal obligation, to satisfy a public interest - more than mere curiosity - in knowing what is contained in the documents or information.

A question of confidentiality arose in *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461 at 473, where Bankes LJ held that a banker's implied obligation of confidentiality with respect to a customer's account and affairs was qualified "(a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer". Scrutton LJ (*ibid.* at 481) and Atkin LJ (*ibid.* at 486) put the qualifications in slightly different terms. This case was relied on by Colman J in *Hassneh Insurance v. Mew* [1993] 2 Lloyd's Rep 243 at 248-249. His Lordship said (*ibid.* at 249):

> In my judgment a similar qualification must be implied as a matter of business efficacy in the duty of confidence arising under an agreement to arbitrate.

I would imply an obligation of confidentiality as a matter of business efficacy but limit the implication by reason of the likelihood that one or other party would have reserved the right to disseminate otherwise confidential material in certain situations. But, in substance, I respectfully agree with his Lordship's observation as to the qualification of the obligation of confidentiality.

I would hold that, in an arbitration agreement under which one party is bound to produce documents or disclose information to the other for the purposes of the arbitration and in which no other provision for confidentiality is made, a term should be implied that the other party will keep the documents produced and the information disclosed confidential except (a) where disclosure of the otherwise confidential material is under compulsion by law; (b) where there is a duty, albeit not a legal duty, to the public to disclose; (c) where disclosure of the material is fairly required for the protection of the party's legitimate interests; and (d) where disclosure is made with the express or implied consent of the party producing the material.

To imply an obligation of qualified confidentiality in this way substantially equates the contractual obligation of a party under an arbitration agreement with the obligation of a party who impliedly gives an undertaking of confidentiality to the Court when obtaining an order for discovery in an action. The underlying principle in the latter situation is that a party who obtains the production of documents or the disclosure of information for a particular purpose cannot use the documents or information for a "collateral or ulterior purpose" (*Alterskye v. Scott* [1948] 1 All ER 469 at 470; see *Central Queensland Cement Pty. Ltd. v. Hardy* [1989] 2 Qd R 509 at 510). That phrase is not used in a pejorative sense, as Lord Diplock said in *Home Office v. Harman* [1983] 1 AC at 302, but it is used:

> merely to indicate some purpose different from that which was the only reason why, under a procedure designed to achieve justice in civil actions, (the solicitor for a party) was accorded the advantage, which she would not otherwise have had, of having in her possession copies of other people's documents.

If the duty of production or disclosure in an arbitration were ordered by a Court, an undertaking to the Court to use the documents produced or information disclosed only for the purposes of the arbitration would be implied and would be enforced by proceedings for contempt. But such an undertaking "can, in appropriate circumstances, be released or modified by the Court" (*Crest Homes Plc., v. Marks* [1987] AC 829 at 854). That dispensing power is not freely exercised (*ibid*. at 860; *EMI Records Ltd. v. Spillane* [1986] 1 WLR 967 at 977; [1986] 2 All ER 1016 at 1023-1024), but it will be exercised when special circumstances appear (*Holpitt v. Varimu* [1991] 103 ALR 684 at 686-687). In the Federal Court, special circumstances have been held to exist where "there is a special feature of the case which affords a reason for modifying or releasing the undertaking and [the feature] is not usually present"(*Springfield v. Bridgelands* [1992] 110 ALR 685 at 693; see also at 691-692; *Holpitt v. Varimu* [1991] 103 ALR at 686-687; *Complete Technology v. Toshiba* [1994] 124 ALR 493 at 501-502). It is unnecessary to consider whether the dispensing power should be so broadly defined. It is relevant to note only that the obligation enforceable as an undertaking to the Court in the case of a curial order is not unqualified.

In the present case, the Minister has a statutory right under the State Electricity Commission Act 1958 (Vic.) ("SEC Act") (cl. 4(2) of "Business and Rules" in the Sixth Schedule. The SEC Act has now been extensively amended by, *inter alia*, the Electricity Industry Act 1993 (Vic.) I assume the relevant provisions are those in force prior to the amendment) to obtain information from the State Electricity Commission of Victoria ("SECV"). It is the duty of SECV to furnish the Minister with the information required under that sub-clause and that duty cannot be defeated by any contractual duty to keep documents or information confidential. Any implied obligation of confidentiality must be qualified accordingly. Further, the Gas and Fuel Corporation of Victoria ("GFC") and SECV are public authorities (see the Gas and Fuel Corporation Act 1958 (Vic.) ("GFC Act"), s. 7; SEC Act, s. 4). They are engaged in the supply of energy in the State of Victoria (GFC Act, s. 22 and Schedule to Sched. 2; SEC Act, s. 12A). The award to be made in the respective arbitrations will affect the price of the energy supplied by the appellants to GFC and SECV and by them to the public. The public generally has a real interest in the outcome, and perhaps in the progress, of each arbitration which the relevant public authority has a duty to satisfy. GFC and SECV have a duty - possibly a legal duty in the case of SECV (see SEC Act, s. 9E(2)(d), (3)) but at least a moral duty in the case of both public authorities - to account to the public for the manner in which they perform their functions. Public authorities are not to be taken, *prima facie*, to have bound themselves to refrain from giving an account of their functions in an appropriate way: sometimes by giving information to the public directly, sometimes by giving information to a Minister, to a government department or to some other public authority.

The duty to convey information to the public may not operate uniformly upon each document or piece of information which is given to GFC or SECV for the purpose of the particular arbitration. Performance of the duty to the public is unlikely to require the revelation of every document or piece of information. It may be possible to respect the commercial sensitivity of information contained in particular documents while discharging the duty to the public and, where that is possible, the general obligation of confidentiality must be respected.

The appellants accept that GFC and SECV are at liberty to disclose to the Minister "if authorized by statute to do so, or for the purpose of the arbitrations" documents and information obtained by them from the appellants in the course of the arbitrations. That concession fails to qualify the implied obligation of confidentiality to the extent that, in my opinion, accords with the intention that ought to be attributed to GFC and SECV at the time when they entered into the respective arbitration agreements. GFC and SECV are both governed by bodies whose constitution is determined or substantially determined by the

Governor in Council (Arts 66, 67, 69 of the articles of association of GFC: Sched. 2 to GFC Act; SEC Act, ss. 4(3), 6, 8(2), (3), 9(2)). The Minister may require GFC to inquire into the steps required, *inter alia*, to secure the safe, economical and effective supply of gas and fuel in Victoria (GFC Act, s. 23(a)), all financial accounts are to be forwarded to the Minister (*ibid*., s. 21(2)) and the Minister may direct GFC to provide the Minister with an annual report on the measures taken in the previous financial year to monitor its compliance with the Act and regulations in relation to the supply of gas (*ibid*., s. 101(1)). The Minister may direct SECV as to the policies it is to give effect to (SEC Act, s. 9D(2)). SECV is to give effect to any direction given to it by the Minister as soon as possible and to report to the Minister thereon (*ibid*., s. 9D(3)). SECV is to operate as far as practicable in accordance with the criteria established from time to time by the Minister with respect to efficiency, economy, safety and reliability (*ibid*., s. 12(2)(a)). The Minister is responsible for convening the annual general meeting of SECV and may convene other meetings at any time (*ibid*., s. 9E). The Government of Victoria has a continuing financial interest in the functioning of both authorities. In the ordinary course of administration of the relevant Acts and in the performance by GFC and SECV of their respective functions, information on energy matters would have to be passed from GFC and SECV respectively to the Minister, and vice versa. Neither GFC nor SECV could be taken to have impliedly undertaken to keep confidential from the Government or the Minister documents or information relevant to the administration of the energy portfolio. The implied obligation of confidentiality is qualified accordingly.

The limitations on the freedom of GFC and SECV to disclose confidential information and documents discovered by the appellants for the purposes of the arbitration do not accord with declarations which the appellants now seek as set out in the Chief Justice's judgment. In the circumstances, I would order that the matter be remitted to the Supreme Court of Victoria to reformulate the declarations or to make such other orders with respect to particular documents or classes of documents as are appropriate and consistent with these reasons for judgment.

Dawson J:

I agree with the judgment of the Chief Justice and have nothing to add.

Toohey J:

The background to this appeal, including the relevant provisions of the two sales agreements made between the first and second appellants, on the one hand, and the Gas and Fuel Corporation of Victoria ("GFC") and the State Electricity Commission of Victoria ("SEC") respectively on the other, appears in the judgment of the Chief Justice.

The appeal gives rise to three questions, which to a large extent overlap. The questions may be identified as follows:

1. Whether, by reason of an implied term in an agreement to submit a dispute to arbitration or because it is inherent in its nature, an arbitration is to be conducted in private in the sense that strangers are excluded unless both parties consent to their presence.
2. Whether arbitration carry an obligation of confidence imposed on the parties in relation to all documents and information that are not already matters of public knowledge.
3. Whether there is a more limited obligation, not to disclose information in documents discovered in the course of an arbitration, comparable to the obligation in civil litigation not to disclose the contents of discovered documents except for the purpose of the litigation.

Privacy

Propositions such as the following from *Russell on the Law of Arbitration* 20th Edn., [1982] at 260 are stated as if they are self-evident:

> Arbitration is a private tribunal for the settlement of disputes. The public, therefore, may not be admitted if their admission is objected to by either party or the arbitrator.

Persons entitled to attend the hearing of an arbitration have been identified in the following way (Bernstein and Wood, *Handbook of Arbitration Practice*, 2nd Edn., (1993) at 144-145).

> Persons entitled to attend the hearing include the following:
>
> (1) each party - if the party is a company, this will include any officer or servant whom the company desires to be present;
>
> (2) any person whom any party desires to represent him or it at the hearing. This may be Counsel, solicitor, surveyor or anyone else. However, if it is the intention of the party to be represented by solicitor or Counsel, he should notify such intention in good time so as to enable the opposing party to be represented by solicitor or Counsel if thought fit;
>
> (3) any person whom a party wishes to have present as a witness, or otherwise to assist in presentation of the party's case;
>
> (4) a shorthand or other notetaker, if the party wishes to have notes taken for the proper presentation of his case in the instant arbitration.

In this regard there are decisions which Brooking J in the Appeal Division of the Supreme Court of Victoria *Esso Aust. v. Plowman* [1994] 1 VR 1 at 9, described as "decisions dealing with complaints about the exclusion of persons whose presence was said to be necessary to the proper conduct of the arbitration by a party" (see *Tillam v. Copp* [1847] 5 CB 211 [136 ER 857]; *Haigh v. Haigh* [1861] 3 De GF & J 157 [45 ER 838]; *Traynor v. Panan Constructions Pty. Limited* [1988] 7 Aust Construction LR 47 (NSW Sup. Ct)). Those decisions involved the power of an arbitrator to exclude a particular person from the hearing, though the person was present at the instance of a party. While the exclusion of strangers was not directly involved in any of these cases, a right to exclude strangers may be inferred from the fact that what was under attack was the arbitrator's power to exclude a person who fell within the categories identified by authors such as Bernstein and Wood as those entitled to attend.

A further relevant time of authority is constituted by those cases which indicate that two or more arbitrations can only heard together with the consent of the parties. In *Oxford Shipping Co. v. Nippon Yusen Kaisha ("The Eastern Saga")* [1984] 3 All ER 835 Leggatt J set aside an arbitrator's order that two arbitrations be heard together. The decision was based directly on the privacy of arbitrations, a concept that "derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them" (*ibid.* at 842). In *Bibby Bulk Carriers v. Cansulex Ltd.* [1989] QB 155 at 166-167. Hirst J relied on the authority of *The Eastern Saga* in saying: "I accept that the arbitration proceeding is a private one, but this arises simply and solely as a result of the contract between the participants".

The Eastern Saga must be read in the light of the judgment of Cole J in *Aerospatiale Holdings Australia Pty. Ltd.* [1992] 28 NSWLR 321 (The New South Wales Court of Appeal dismissed an application for leave to appeal. In the High Court Gaudron J declined to grant a stay pending an application for special leave to appeal: *Elspan International Ltd. v. Aerospatiale Holdings Ltd.* [1992] 67 ALJR 177. The application for special leave to appeal

was discontinued on 6 April 1993) Cole J referred a number of disputes to arbitration. In doing so he appointed the same person as arbitrator for all disputes and directed that, unless the arbitrator decided otherwise, all disputes would be heard together. Privacy was treated as one factor to be weighed along with other "material circumstances" in the exercise of the Court's discretion (see the discussion at [1992] 28 NSWLR at 327). His Honour distinguished *The Eastern Saga* on the ground that in the case before him the parties to the arbitrations were not in reality different: "Although they may technically be `strangers' to that dispute, there is no realistic sense in which that is so." (*Ibid*. at 326) Jacobs *Commercial Arbitration Law and Practice* at para. 1.383 criticises Cole J's decision, saying that its effect is that in New South Wales "the principle of privacy can no longer be said to apply". In the present case Brooking J disputed this analysis of *Aerospatiale*, stating that Cole J's judgment recognises the importance of privacy in arbitrations *Esso Aust. v. Plowman* [1994] 1 VR at 13.

Whatever the current state of the law with respect to the joint hearing of arbitrations (on which it is unnecessary to express an opinion), it is clear, as Brooking J recognised, that "it is and has been for many years, if not indeed ever since the emergence of arbitration, the practice for arbitrations to be conducted in private" (*ibid*. at 12). Parties agree to refer their disputes to arbitration on the assumption that the hearing will be conducted in private (see *Hassneh Insurance v. Mew* [1993] 2 Lloyd's Rep 243 at 246). The law has given effect to this understanding in a number of ways, without any clear recognition of it as an independent legal rule. Privacy should be implied as a term of the agreement to arbitrate; the implied term is attached as a matter of law rather than to give business efficacy to the agreement (see *Esso Aust. v. Plowman* [1994] 1 VR at 12-13 per Brooking J). A term is implied as a matter of law "as the nature of the contract itself implicitly requires" (*Liverpool C.C. v. Irwin* [1977] AC 239 at 254 per Lord Wilberforce. See also *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] AC 555 at 576-577. As to implying a term to give business efficacy to a contract, see *Codelfa Construction Pty. Ltd. v. State Rail Authority of NSW* [1982] 149 CLR 337). The very nature of arbitration agreements, the established practice for arbitrations to be conducted in private and the importance attached to privacy in arbitration hearings indicate that a term requiring privacy should be implied as a matter of law.

Confidentiality

If there is no restraint on a party to an arbitration making public what was said or done at an arbitration, including the contents of documents tendered to the arbitrator, there would be little point in excluding strangers from an arbitration (see Bernstein and Wood, *op. cit*. at 145). Effect was given to this approach in *Dolling-Baker v. Merrett* [1990] 1 WLR 1205, when the English Court of Appeal restrained a party to an arbitration from disclosing, in a later action, documents relating to the arbitration. The Court accepted, however, that if discovery and inspection of the documents are necessary for the fair disposition of the later action, they may be ordered.

In the present appeal the respondent Minister sought to draw a distinction between the privacy attaching to an arbitration hearing and the confidentiality attaching to what takes place at such a hearing. While clearly it is not possible to say that every aspect of an arbitration is confidential in every circumstance, no sharp distinction can be drawn between privacy and confidentiality in this context. They are, to a considerable extent, two sides of the same coin. The privacy of an arbitration hearing is not an end in itself; surely it exists only in order to maintain the confidentiality of the dispute which the parties have agreed to submit to arbitration.

A distinction between privacy and confidentiality has been drawn in the context of Court proceedings. For example, legislatures have made provisions allowing Judges to prohibit the publication of evidence given in open Court (For example, Crimes Act 1900 (NSW) s. 578; Evidence Act 1910 (Tas.), s. 103A). This may be done in conjunction with the closing of the Court, but the two need not be done together (For example, Evidence Act 1929 (S.A.), ss. 69 and 69a; Evidence Act 1971 (ACT), s. 83(2); Evidence Act (NT), s. 57(1)). There is also a line of authority which suggests that Judges have inherent power to prohibit the publication of certain matters arising during the trial, such as the identity of witnesses, even though the matters are raised in open Court (*Reg. v. Socialist Worker Printers and Publishers Ltd.; Ex parte Attorney-General* [1975] QB 637 at 652 per Lord Widgery CJ; *Taylor v. Attorney-General* [1975] 2 NZLR 675; *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166 at 170 per Mc Pherson J).

However no analogy can fairly be drawn between arbitrations and Court proceedings in this regard. The right to publish a report of Court proceedings is an important common law right that is "vital to the proper working of an open and democratic society and to the maintenance of public confidence in the administration of justice" (*John Fairfax & Sons v. Police Tribunal* [1986] 5 NSWLR 465 at 481 per McHugh JA). Thus even a statutory power to exclude the public from proceedings will not necessarily abrogate this common law right (*ibid*). Furthermore, when information given in Court proceedings is protected, it is not the publication *per se* that is objectionable, rather it is the contempt of Court resulting from disobedience of the non-publication order. Only publications which interfere with the due administration of justice will of themselves amount to a contempt of Court (*Attorney-General v. Leveller Magazine* [1979] AC 440 at 452 per Lord Diplock, 465 per Lord Edmund-Davies). And even when the guiding concern is the "due administration of justice" rather than the private rights and interests of parties, there is still some recognition that the privacy of hearings and the non-publication of matters raised at trial to a large extent go together. Thus when a witness reveals his or her identity at an open Court hearing, a previous non-publication direction may be taken to have been effectively abandoned (*ibid*. at 452-453, 456, 469).

It is true that until *Dolling-Baker* there had been no English decision supporting a principle of confidentiality of arbitration hearings. And the one Australian decision that touches the point, (*Alliance Petroleum Australia N.L. v. Australian Gas Light Co.* [1983] 34 SASR 215 at 231), tends to be against the existence of an obligation of confidentiality. But the lack of authority is inconclusive. No doubt, it is possible to infer therefrom the absence of such an obligation *Esso Aust. v. Plowman* [1994] 1 VR at 14, 32. But, equally, it may well be that the long established acceptance of privacy has carried with it an assumption of confidentiality, at least in general terms (The lack of attention given to confidentiality in commercial arbitrations is in contrast to the significant attention given to the subject in mediation, the latter being "a topic of much interest and debate among the dispute resolution community": New South Wales Law Reform Commission, *Training and Accreditation of Meditators*, Report No. 67, [1991] at para. 5.32. Also see Attorney-General's Department (Victoria), *Attorney-General's Working Party on Alternative Dispute Resolution*: Report [1990] at paras. 5.18 - 5.20; and Attorney-General's Department (Commonwealth), *Dispute Resolution in Commercial Matters: Papers*, (Canberra), 6 June 1986 at 11-13).

It is also true that complete confidentiality of the proceedings in an arbitration cannot be achieved. The Chief Justice gives illustrations of circumstances in which a party to arbitration proceedings must be able to disclose aspects of the proceedings to others. But the appellants did not contend for a principle of complete confidentiality. Their Counsel said:

> We are not contending that they are secret proceedings, in the sense that there is an absolute shroud over them at all; we just say that the documents and information that are provided for the purposes of this resolution in private of this private dispute should be treated as private and not disclosed except for the purposes of the dispute or as required by law.

In this regard it does not advance the matter to refer to such situations as a party to an arbitration over the building of his house, being asked by his wife: "How did it go?"(*Esso Aust. v. Plowman* [1994] 1 VR at 15-16). It is not hard to visualise situations in which disclosure by a party may be incidental and of no consequence. But the issue is whether there is a principle of confidentiality upon which one party may rely to restrain the disclosure by the other party of information given at the arbitration which the first party wishes to protect from disclosure. Ordinarily, that party will only seek to do so where the disclosure may have some adverse consequence.

Much of the difficulty that has surrounded this litigation since it began in the Supreme Court of Victoria has stemmed from the varying forms of declarations for which the parties have contended. The chameleon-like character of the declarations has tended to push the debate into the area of semantics. Initially the parties took their stands on propositions cast in virtually absolute terms. That is, the Minister was arguing for a declaration that all information disclosed was not subject to any obligation of confidence, while the appellants sought declarations that any documents or information supplied were to be treated in confidence as between the parties. These rival contentions were later modified, to take on a more specific shape. However, they did not assume a final form until the last day of the hearing in this Court.

As a result of the Appeal Division's decision, there are two declarations extant and the argument before this Court necessarily focused on them. They are:

> 6C. (GFC) is not restricted from disclosing information to the Minister and third persons by reason only that:
>
> (a) the information was obtained by it from Esso/BHP in the course of or by reason of arbitration pursuant to the 1975 Sales Agreement; and
>
> (b) the information has not otherwise been published.
>
> 6F. SEC is not restricted from disclosing information to the Minister and third persons by reason only that:
>
> (a) the information was obtained by it from Esso/BHP in the course of or by reason of arbitration pursuant to the 1981 Sales Agreement; and
>
> (b) the information has not otherwise been published.

In this regard it is necessary to mention the State Electricity Commission Act 1958 (Vict.). Clause 4(2) of "Business and Rules" in the Sixth Schedule to the Act empowered the Minister to obtain from SEC "all documents papers and minutes which he requires either for Parliament or himself"(Clause 4(2) has now been repealed. See Electricity Industry Act 1993 (Vict.), s. 113). There is no comparable provision in the Gas and Fuel Corporation Act 1958 (Vict.). It is clear that SEC cannot, by declaration, be restricted from disclosing information to the Minister which the Minister was entitled to under the State Electricity Commission Act.

In terms of formulation, it is easy enough to express a principle of non-confidentiality. In effect, that is what the Minister has done in declarations 6C and 6F which he seeks to uphold. But it is much harder to express a principle of confidentiality which accepts, as it must, that there are significant exceptions. And this has been the appellants' difficulty from the outset of this litigation. A principle of confidentiality, expressed to be subject to "all just exceptions" or the like, is a principle so nebulous as to be hardly a principle at all. Brooking J referred to the problem in these terms (*ibid*. at 31):

> But one of the great obstacles to the adoption of the principle of confidentiality now put forward lies in identifying and stating the exceptions which will prove the rule, particularly that permitting disclosure where the interests of the party require it. I could not accept a general rule which was not subject to some such exception, having regard to what I believe occurs in practice and to what I believe to be `equitable'. But in what terms is the exception to be expressed?

Later his Honour said *ibid*. at 32:

> The difficulty in formulating both the general rule and the exceptions (for one cannot consider the one without the other) tells against its recognition.

Colman J in *Hassneh*, was conscious of the difficulties; nevertheless he recognised an obligation of confidentiality, saying ([1993] 2 Lloyd's Rep at 250):

> It is reasonably clear that ... such documents are subject to a duty of confidence. They are merely the materials which were used to give rise to the award which defined the rights and obligations of the parties to the arbitration. Accordingly, that qualification to the duty of confidentiality based on the reasonable necessity for the protection of an arbitrating party's rights against a third party cannot be expected to apply to them. It is the final determination of rights expressed in the award which is pertinent as against third parties, not the raw materials for the determination. The relevant exception in the case of such documents is an order or leave of the Court.

The duty of confidence to which Colman J referred was a duty which his Lordship derived from the privacy attached to an arbitration hearing. He found that privacy to be an implied term of an agreement to arbitrate (cf. *Dolling-Baker v. Merrett* [1990] 1 WLR at 1213 where Parker LJ said that the obligation of confidentiality arises "out of the nature of arbitration itself"). Colmon J then went on to say ([1993] 2 Lloyd's Rep at 247) that "the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing". In putting it that way, his Lordship must be taken as viewing confidentiality in arbitrations as an aspect of the implied term in an agreement to arbitrate, namely, that the hearing shall be held in private.

It is curious that while the question of confidentiality in arbitration proceedings has arisen from time to time, the Courts, until recently, have not found it necessary to enunciate any relevant principle. In the end the matter is not one to be resolved in general terms for it is not possible to formulate a principle based on complete confidentiality or a complete lack thereof. It is necessary to focus on particular categories of documents and information. Nevertheless, this must be done against some background of principle, even if only to identify exceptions.

In conventional litigation, documents which are disclosed and produced by one party to another pursuant to the rules of Court relating to discovery of documents are subject to an implied undertaking that they will not be used for any purpose other than in relation to the litigation itself (*Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.* [1975] QB 613 at 618-620; *Riddick v. Thames Board Mills* [1977] QB 881 at 895-896; *Home Office v. Harman*

[1983] 1 AC 280). There is no reason in principle why the same obligation should not attach to documents produced at the instance of an arbitrator. Indeed, given the private nature of the arbitration hearing, there is every reason why the obligation should attach. In *Hassneh* Colman J said ([1993] 2 Lloyd's Rep at 247):

> In as much as the parties to an English law arbitration impliedly agree to use English discovery procedure, or at least to submit to the possibility that such procedure will apply, it must by implication be their mutual obligation to accord to documents disclosed for the purposes of the arbitration the same confidentiality which would attach to those documents if they were litigating their disputes as distinct from arbitrating them. The fact that the proceedings are in private lends weight to the necessity for that implication.

What Colman J said of the position in England applies equally to Australia.

Next, there is the award itself and, where applicable, the reasons for that award. An award may, with the leave of the Supreme Court, be enforced in the same manner as a judgment or order of the Supreme Court to like effect (Commercial Arbitration Act 1984 (Vict.), s. 33). To that extent, as Colman J observed in *Hassneh* [1993] 2 Lloyd's Rep at 247, an award "is at least potentially a public document for the purposes of supervision by the Courts or enforcement in them". In any event, an award gives rise to the rights and obligations between the parties which may be enforced as independent contractual obligations (*Bremer Oeltransport GmbH v. Drewry* [1933] 1 KB 753). Furthermore, an award may be challenged in the Courts, by reason of the misconduct of the arbitrator or for such other reason as may be available. In these circumstances any duty of confidentiality must yield to a right in a party to an award to disclose that award to a third party where it is reasonably necessary to do so to protect the interests of the party under the award.

What then of any reasons accompanying an award? The reasons may refer to the pleadings, the evidence and the arguments. Of course if there is no confidentiality attaching to arbitrations, that is of no consequence. If some confidentiality does attach, it may be a matter of concern. However, to require a party seeking to enforce an award (or indeed, to resist enforcement) to observe confidentiality may place that party at a considerable disadvantage. The award may only be fully intelligible when read with the reasons. Furthermore, the reasoning which led to the terms of the award may serve to explain those terms and perhaps be a basis of challenge to the award. It is therefore necessary to attribute to the reasons the same qualification attributed to the award, namely, that they may be disclosed to a third party where it is reasonably necessary to do so to protect the interests of a party to the arbitration.

That leaves for consideration whether, despite the qualifications already mentioned, there is nevertheless some obligation of confidentiality attaching to the documents and information emanating from an arbitration. I would find such an obligation to be a term implied as a matter of law in commercial arbitration agreements. The term is implied from the entry by the parties into a form of dispute resolution which they choose because of the privacy they expect to result. If this is said to confuse privacy and confidentiality, the answer is that they are not distinct characteristics. As Colman J said in *Hassneh* [1993] 2 Lloyd's Rep at 247:

> The disclosure to a third party of (a note or transcript of the evidence) would be almost equivalent to opening the door of the arbitration room to that third party.

Any aspect of disclosure to third parties must infringe the privacy of the arbitration. Thus, if one party is free to disclose to a newspaper or media outlet the progress of an arbitration and the evidence adduced in its course, the notion of privacy is meaningless. There must be

an underlying principle, significantly qualified in accordance with these reasons, that a party to an arbitration is under a duty not to disclose to a third party documents and information obtained by reason of the arbitration.

Although it did not arise in this appeal, I agree with the Chief Justice that there is a "public interest" exception to the principle. But it is unnecessary and inappropriate to discuss the boundaries of that exception.

Documents discovered in the arbitration

The reasons which have led to a broad principle of confidentiality have answered the question of documents discovered by one party to another in the course of the arbitration. But whether or not there is such a principle, confidentiality clearly attaches to this category of information.

Conclusion

It follows from these reasons that declarations 6C and 6F cannot stand. The appeal should be allowed and those declarations set aside. The parties should be given an opportunity to make written submissions as to the orders that should be made to give effect to these reasons. However, I would not dissent from the view of the majority that the matter should be remitted to the Supreme Court of Victoria.

McHugh J:

I agree with the reasons for judgment of Mason CJ.